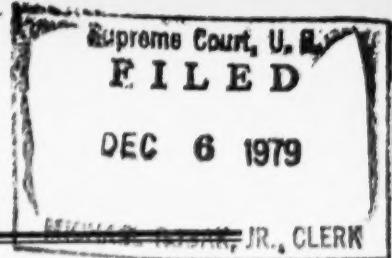


79-872



IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

No.

CAROL G. BAILEY, individually, and as administratrix of
SILAS J. BAILEY, Deceased,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

CARL C. BANNO
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**PETITION FOR A WRIT OF CERTIORARI TO THE
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The petitioner, CAROL G. BAILEY, respectfully prays
that a writ of certiorari issue to review the judgment and opin-
ion of the United States Court of Appeals for the Second Cir-
cuit entered in this proceeding on September 7, 1979.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the
Second Circuit appears at Appendix A, *infra*, page 1a. The
opinion of the United States District Court of the Southern
District of New York (Gagliardi, D.J.) and the judgment
entered thereon appear at Appendix B, *infra*, pages 2a-3a.

JURISDICTION

The order or judgment of the United States Court of Appeals for the Second Circuit was entered September 7, 1979. See Appendix A, page 1a, *infra*. This petition was filed within 90 days from said date. The jurisdiction of this Court is invoked under the Federal Tort Claims Act, 28 U.S.C. sec. 2671 et. seq., and its jurisdictional counterpart, 28 U.S.C. sec. 1346(b). Under the FTCA the United States waives its sovereign immunity with regard to tort suits, with certain exceptions and under U.S.C. sec. 1346(b) vests exclusive jurisdiction in the federal district courts over such actions.

QUESTIONS PRESENTED

1. Has the United States, under the FTCA, waived its sovereign immunity as to tort claims made by military personnel, be they on permanent, temporary, civilian, active or inactive duty as Regular, Reserve or National Guard?
2. Are the doctrines laid down in *Feres v. U.S.*, 340 U.S. 135 (1950); *Henning v. U.S.*, 466 F.2d 4438 (4th Cir. 1971); *U.S. v. Brown*, 348 U.S. 110 (1954); *Brooks v. U.S.*, 337 U.S. 49 (1948); *U.S. v. Muniz*, 374 U.S. 150 (1963), still valid or inconsistent with each other or with the FTCA?
3. Have the aforesaid decisions created great confusion and injustice to the military serviceman, and discriminated against him and unconstitutionally deprived him of his rights?
4. Are the issues presented herein of public importance?

PERTINENT SECTIONS OF THE FTCA

28 U.S.C. §1346(b) provides:

§1346 United States as defendant:

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court of the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office of employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674 provides:

§2674. Liability of United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof. June 25, 1948, c.646, 62 Stat. 983.

28 U.S.C. §2680 provides:

§2680. Exceptions.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

STATEMENT OF FACTS

Petitioner is the widow of SILAS J. BAILEY, a civilian, with the rank of Sergeant in the National Guard. She sued herein as administratrix of his estate.

The deceased was a civilian and a member of the Army National Guard, holding the rank of Sergeant E-5. He performed his training periods (inactive duty) one weekend per month. While on such a training period on April 24, 1977, at Fort Drum, New York, he sustained a wound which resulted in his death on April 25, 1977. This occurred when ammunition from a 50-calibre gun owned, operated and controlled by the United States discharged due to the negligence of employees of the United States while acting within the scope of their employment and in the line of their duty.

The United States moved to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. In a memorandum decision filed March 21, 1979, the district court granted the motion deeming it a motion on the pleadings, and, judgment was entered dismissing the complaint. See Appendix B, pages 2a-3a, *infra*. The United States Court of Appeals for the Second Circuit affirmed; see Appendix A, page 1a, *infra*.

The district court asserted there was "confusion among the federal courts" as to when a military person may recover

damages against the United States on tort claims. It recognized the unambiguous nature of the FTCA giving military personnel the right to such claims except when the injuries arise out of combatant activities during time of war in a foreign country. 28 U.S.C. §2680(j) and §2680(lk). The "confusion" does not arise out of the clear mandate of the statute, but from court-created exceptions: *Brooks v. U.S.*, *Feres v. U.S.*, and *Brown*, all *supra*, and further from the interchangeable use by the courts of the phrases "incident to military service" and "in the line of military duty". Because the complaint used the words "on duty," the district court felt it must adhere to the *Feres v. U.S.*, *supra*, doctrine, and apparently reluctantly dismissed the complaint.

On appeal, petitioner argued, among other things, that the deceased was a civilian who was on a training period, referred to as "inactive duty" for a weekend. In spite of this, the Court of Appeals stated: "It is undisputed that SILAS J. BAILEY died . . . while he was on active military duty." The court was in error. A major point was that he was not "on active military duty". Moreover, there was a serious dispute about this point.

Nevertheless, as important as the question of duty and the time of the negligent act as related to the time of the occurrence, are, the Court disregarded all the points raised as to the validity and fairness of the court-created exceptions to the FTCA; the confusion of the decisions of the various federal courts; and the public importance of this issue.

**THE PUBLIC IMPORTANCE OF THE
ISSUES PRESENTED**

The question is best illustrated by an article in *The Times Magazine* which is widely circulated as a supplement to the *Army Times*, *Navy Times*, and *Air Force Times*. It is the October

1, 1979, issue. The front cover has a picture of the Supreme Court of the United States and it states: "If your military doctor makes a mistake, can you sue?" The article begins on page 6 and ends on page 12. Over various pictures of the Supreme Court, it states: "If you are on active duty, you cannot sue the government for medical malpractice. Is that Justice? Military people are deprived of a right allowed to all other Americans: the right to sue the government for damages." The roots of this 'incredible justice' go back to a little-noticed Supreme Court case in 1950" (*Feres*). The article concludes with such conclusions as: "The real issue, however, isn't money, but civil rights for active duty people." "But what about fairness, simple equality under the law?"

The military are a minority and the court has singled them out as unworthy to be treated as other citizens. In apparent reference to *United States v. Muniz, supra*, the said article claims "Even federal prisoners, courts have ruled, have that right. In effect, *The Times Magazine* believes, active duty people have been categorized as second-class citizens."

It is significant the writer of the article did her homework, for she says: "Over the decades since that Supreme Court ruling — the so-called *Feres* Doctrine — various lower courts in the country have interpreted the doctrine in different ways, causing widely unequal rulings. Some courts have ruled that a serviceman injured on leave could sue the government, others that he could not. Other judges have emphasized location — if the injury occurred off base, service people could sue; if it happened on base, they could not. The result has been legal confusion and, for some . . . personal tragedy."

Looking at the problem from a fair view, the FTCA is clear and unambiguous and grants all citizens the right to sue except

as specifically provided, and, for military personnel, except when injured overseas in combat. If *Feres* had any usefulness, it now has outlived it. If the Court cannot adopt this reasoning, then the confusion should be ended and all exceptions within exceptions should be eliminated. A bold declaration should be made that all military men, whatever their connection with the military, have no rights under the FTCA. In that respect they are not equal to their fellow-Americans who are in no way connected with the military.

Certainly, this course would be unwise, particularly in these times of crises. Voluntary enlistments are falling. The military personnel are being stripped of many benefits and rights. Denying them basic rights, such as the right to sue, is undoubtedly a source of dissatisfaction which will further endanger our defense forces by reducing enlistments and re-enlistments.

It was Judge Cardozzo, in *Anderson v. Hayes*, 243 N.Y. 140, at 146, who said: "The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

CARL C. BANNO
146 Old Country Road
Mineola, New York 11501
Counsel for Petitioner

APPENDIX B

MEMORANDUM DECISION OF DISTRICT COURT

**CAROL G. BAILEY, individually, and as Administratrix of the
Estate of SILAS J. BAILEY, Deceased,**

Plaintiff,

-against-

UNITED STATES OF AMERICA,

Defendant.

78 Civ. 674

GAGLIARDI, D.J.

Plaintiff Carol Bailey, the widow of Silas J. Bailey and the administratrix of his estate, seeks damages for his alleged wrongful death in this action brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §2671 *et seq.* Jurisdiction is premised upon 28 U.S.C. §1346(b). The government has moved for judgment on the pleadings pursuant to Rule 12(c), Fed. R. Civ. P. For the following reasons, the motion is granted.

Plaintiff alleges that the deceased was a sergeant with the New York National Guard and was on duty at Fort Drum, New York on April 24, 1977 when ammunition discharged from a 50-calibre machine gun situated on a tank struck him causing his death. Plaintiff claims that her husband's death resulted from the negligent maintenance of the machine gun and tank and the negligent training of the decedent's superior officers.

There is some confusion among the federal courts concern-

APPENDIX

APPENDIX A**Opinion of United States Court of Appeals
for the Second Circuit**

At a stated term of the United States Court of Appeals for the Second Circuit held at the United States Courthouse in the City of New York on the 7th day of September 1979.

Present: Hon. Irving R. Kaufman, Ch.J.; Jon O. Newman, Amalya L. Kearse, Circuit Judges.

[TITLE] 79-6073

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed.

It is undisputable that Silas J. Bailey died as a direct result of wounds inflicted while he was on active military duty. Recovery under the Federal Tort Claims Act, 28 U.S.C. §2671 *et seq.*, is, therefore, foreclosed. *Feres against U.S.*, 340 U.S. 135 (1950). *Accord, Spencel Aero Engineering Corp. against U.S.*, 431 U.S. 666 (1977), *Camassar against U.S.*, 531 F.2d 1149 (2d Cir. 1976)

[SIGNED]

Irving R. Kaufman, Ch. J.
Jon O. Newman, Amalya L. Kearse
Circuit Judges

ing the circumstances under which members of the armed forces may recover against the United States for negligently inflicted injuries. Although the statute unambiguously bars only claims "arising out of the combatant activities of the military or naval forces or the Coast Guard, during time of war," 28 U.S.C. §2860(j) and "arising in a foreign country", *id.* §2860(k), a non-statutory exception, and the resultant confusion, arises from three United States Supreme Court cases. *Brooks v. United States*, 337 U.S. 49 (1949); *Feres v. United States*, 304 U.S. 135 (1950); *United States v. Brown*, 348 U.S. 110 (1954). The confusion stems from the Court's interchangeable use of two phrases to define the appropriate standard: servicemen are barred from recovery for injuries incurred either "incident to military service" or "in the line of military duty". *See Hale v. United States*, 416 F.2d 355, 358-59 (6th Cir. 1969) (citing cases adopting one or the other or both standards), *Milliken v. United States*, 439 F.Supp. 290, 294 (D. Kan. 1976). "Incident to military service" is arguably a far broader limitation than "line of duty" and, therefore, more favorable to the government. Two more recent Supreme Court cases, in dicta, appear to adopt the "line of duty" construction. *See Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 669 (1979) (referring to *Feres* doctrine as precluding recovery by federal soldier for injury sustained while "on duty"); *United States v. Muniz*, 374 U.S. 150, 162 (1963), (explaining *Feres* in terms of the policies at stake when acts committed "in the course of military duty"). Even if this more favorable standard for servicemen is applied to this case, however, the action must be dismissed. The complaint alleges quite clearly that the deceased incurred his injury "while stationed *on duty* at Fort Drum, Watertown, New York." (Complaint, par. 6)(emphasis added).

The government's motion for judgment on the pleadings is granted. Let the clerk enter judgment dismissing the complaint.

So

Ordered.

S/Leo P. Gagliardi, U.S.D.J.

Dated: New York, New York, March 21, 1979.

No. 79-872

Supreme Court, U. S.

FILED

JAN 26 1980

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

CAROL G. BAILEY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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*ON PETITION FOR A WRIT OF CERTIORARI TO
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THE SECOND CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

Petitioner commenced this action under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. 1346(b), 2671 *et seq.*, seeking damages from the United States as compensation for her husband's alleged wrongful death while serving as a sergeant in the Army National Guard. According to petitioner's complaint, the discharge from a machine gun mounted on top of a tank struck and killed her husband while he was on duty at Fort Drum, New York, on April 24, 1977. Petitioner asserted that this accident was the result of negligent maintenance of the tank and gun and inadequate training of the army personnel involved. Relying on *Feres v. United States*, 340 U.S. 135, 146 (1950), which held that servicemen cannot recover under the FTCA for injuries "incident to [their military] service," the district court dismissed the complaint (Pet. App. 2a-3a). The court of appeals summarily affirmed (*id.* at 1a).

Petitioner primarily contends (Pet. 5-7) that this Court should reconsider the *Feres* doctrine, because it is unfair to military personnel. As the Court explained in *Feres*, however, the FTCA was designed to compensate victims of governmental misconduct who lacked any other meaningful remedy, whereas Congress has otherwise provided "simple, certain, and uniform compensation for injuries or death of those in armed services." 340 U.S. at 144; see *id.* at 140, 145. In addition, the *Feres* doctrine reflects the special relationship of the soldier to the government and his superior officers and the realization that damage suits in this context would adversely affect military discipline. See 340 U.S. at 141-144; *United States v. Brown*, 348 U.S. 110, 112 (1954). See also *Brown v. Glines*, No. 78-1006 (Jan. 21, 1980), slip op. 6. The Court has recently re-examined and approved the *Feres* doctrine (*Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 669-674 (1977)) and there is no reason to do so again here.¹

Petitioner further suggests (Pet. 4-5) that the *Feres* doctrine is in any event inapplicable, because her husband was on "inactive duty for a weekend."² But petitioner's own complaint asserted that her husband was

¹Indeed, even if an FTCA suit were permitted here, petitioner's claim would seemingly be barred under New York law. See *Goldstein v. New York*, 281 N.Y. 396, 24 N.E. 2d 97 (1939) (no liability to state for injuries suffered incident to service in militia).

²We do not understand petitioner to contend that her husband's death did not occur "in the course of activity incident to service." 340 U.S. at 146. Such a contention would be frivolous. See, e.g., *Poe v. United States*, 577 F. 2d 752 (9th Cir.), cert. denied, 439 U.S. 1047 (1978); *Camassar v. United States*, 531 F. 2d 1149 (2d Cir. 1976); *Hass v. United States*, 518 F. 2d 1138 (4th Cir. 1975); *Herreman v. United States*, 476 F. 2d 234 (7th Cir. 1973). Rather, petitioner appears to argue that her husband was not a "serviceman" within the scope of the *Feres* doctrine.

killed while on military duty and during active military training. It is well settled that the *Feres* doctrine applies to National Guardsmen injured or killed during military training of any variety or duration. See, e.g., *Donham v. United States*, 395 F. Supp. 52, 53 (E.D. Mo. 1975), aff'd, 536 F. 2d 765 (8th Cir. 1976), aff'd *sub nom. Stencel Aero Engineering Corp. v. United States*, *supra*, 431 U.S. at 667-668 & n.1; *Herreman v. United States*, 476 F. 2d 234, 236 (7th Cir. 1973); *Layne v. United States*, 295 F. 2d 433, 435 (7th Cir. 1961), cert. denied, 368 U.S. 990 (1962); *Spain v. United States*, 452 F. Supp. 585 (D. Mont. 1978).³

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.

Solicitor General

JANUARY 1980

³Likewise, there is no doubt that decedent's family (including petitioner) is entitled to the full range of benefits available to a deceased serviceman's family. See, e.g., 32 U.S.C. 321; 38 U.S.C. 410-411; 38 U.S.C. 1700 *et seq.*; 10 U.S.C. 1481, 1482.